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Case Cited

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IN THE

Supreme Court of the United States

October Term, 1960

No. 269

In the Matter of

FIDELITY TUBE CORPORATION,

Bankrupt.

BOROUGH OF EAST NEWARK and RAYMOND J. OTIS, as Trustee in Bankruptcy of FIDELITY TUBE CORPORATION, Bankrupt,

Appellants,

—v.—

THE UNITED STATES OF AMERICA,

Appellee.

PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC. FOR LEAVE TO FILE A PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Borough of East Newark and Raymond J. Otis, as Trustee in Bankruptcy of Fidelity Tube Corporation, pray for leave to file a petition for rehearing of the petition heretofore filed for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Prior Disposition

On October 10, 1960, the Supreme Court of the United States denied the petition heretofore filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Third Circuit. The denial of the petition appears at — U. S. —.

Grounds for Within Petition

1. It is submitted that a circumstance of substantial effect has intervened subsequent to the denial of the petition for a writ of certiorari; more specifically, a decision rendered by the United States Court of Appeals for the Second Circuit on October 31, 1960, in *City of New York* v. *United States*, No. 26,098, F. 2d , unofficially reported in Commerce Clearing House Bankruptcy Law Reports Bulletin #143, dated November 30, 1960, at Par. 60,042.

2. The case with respect to which certiorari was sought dealt, among other things, with the contention of the United States that it was entitled to lien status for tax claims made against the bankrupt estate despite the fact that, as to one category of claims, assessments had been made prior to bankruptcy, but demand therefor made *after* bankruptcy intervened.

3. Petitioners argued in the brief filed in support of their appeal to the Court of Appeals for the Third Circuit, that no liens could affect the assets and property which came into possession of the Trustee in Bankruptcy *after* bankruptcy, unless said liens were valid and effectual prior thereto.

4. The Court of Appeals for the Third Circuit, in deciding adversely to the claim of petitioners, stated:

> "It is clear that if bankruptcy had not intervened the United States would have had a valid lien if demand was made prior to the date when the assessment became unenforceable by reason of lapse of time and we can find no provision of the Bankruptcy Act which would prevent a lien arising in favor of the United States under Sections 3670 and 3671 because of a delayed demand by the District Director.
>
> "In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the demand is made the lien relates back to the date of the assessment, in the case at bar to a time prior to bankruptcy."

5. In the *City of New York* case, cited above, the Court of Appeals for the Second Circuit has held, contrary to the Court of Appeals for the Third Circuit, that a lien for taxes claimed by the United States must be *perfected* prior to the intervention of bankruptcy proceedings. The Court there was confronted with the lien status of federal tax deficiencies which had been assessed after the taxpayer had made an assignment for the benefit of creditors (which act of assignment constituted an act of bankruptcy).

The Court noted that under the applicable state law governing assignments for the benefit of creditors, the estate was said to be in *custodia legis*, and it further stated as follows:

> "The Section 6321 lien [substantially identical with Section 3670 of the Internal Revenue Code of 1939] attaches only to the extent of taxpayer's property interest, United States v. Burgo, 175 F. 2d 196 (3d Cir. 1949), and is not a proper basis for a levy on contingent rights before they come into being. United States v. Long Island Drug Co., 115 F. 2d 983 (2d Cir. 1940). Thus, the property, after it had been assigned by the taxpayer, could not be subjected to the government's lien."

6. It is submitted that a conflict now exists between the Circuits with respect to the perfectability of a lien asserted by the United States against the estate of a bankrupt and that petitioner should be granted leave to file a petition with this Court for rehearing of the petition heretofore filed for a writ of certiorari.

Dated: December 19, 1960.

Respectfully submitted,

ALLAN L. TUMARKIN,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1960

No. 269

In the Matter of

FIDELITY TUBE CORPORATION,

Bankrupt.

BOROUGH OF EAST NEWARK and RAYMOND J. OTIS, as Trustee in Bankruptcy of FIDELITY TUBE CORPORATION, Bankrupt,

Appellants,

—v.—

THE UNITED STATES OF AMERICA,

Appellee.

PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC., FOR A REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Borough of East Newark and Raymond J. Otis, as Trustee in Bankruptcy, etc., present this Petition for a rehearing of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and in support thereof respectfully show:

1. On October 10, 1960, this Court denied the petition heretofore filed by petitioners for a writ of certiorari. The denial of the petition appears at — U. S. —.

2. Petitioners seek a rehearing upon the following grounds:

a) A circumstance of substantial effect has intervened subsequent to the denial of the petition referred to above in that a recent decision of the United States Court of Appeals for the Second Circuit *City of New York v. United States*, No. 26,098, October 31, 1960, F. 2d [ ] now places that Circuit and the Third Circuit in conflict with respect to the perfectability of a lien asserted by the United States against the estate of a bankrupt.

3. The case with respect to which certiorari was sought by petitioners dealt, among other things, with the contention of the United States that it was entitled to lien status for tax claims made against the bankrupt estate despite the fact that, as to one category of claims, assessment had been made prior to bankruptcy, but demand therefor made *after* the filing of the petition in bankruptcy.

4. Petitioners argued, among other things, in the brief filed in support of their appeal to the Court of Appeals for the Third Circuit, that no liens could affect the assets and property which came into possession of the Trustee in Bankruptcy *after* bankruptcy, unless said liens were valid and effectual *prior* thereto.

5. The Court of Appeals for the Third Circuit, in deciding adversely to the claim of petitioners, stated:

> "It is clear that if bankruptcy had not intervened the United States would have had a valid lien if demand was made prior to the date when the assessment became unenforceable by reason of lapse of time and we can find no provision of the Bankruptcy Act which would prevent a lien arising in favor of the United States under Sections 3670 and 3671 because of a delayed demand by the District Director.
>
> "In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the de-

mand is made the lien relates back to the date of the assessment, in the case at bar, to a time prior to bankruptcy."

6. In *City of New York* v. *United States*, *supra*, the Court of Appeals for the Second Circuit has held, contrary to the Court of Appeals for the Third Circuit, that a lien for taxes claimed by the United States must be perfected prior to bankruptcy proceedings, otherwise it will be treated as an ordinary tax claim. A copy of said opinion is reprinted in full in the appendix to this petition.

For the foregoing reasons, it is urged that this petition be granted and that the judgment of this Court denying the petition heretofore filed for a writ of certiorari be recalled.

Dated: December 19th, 1960.

Respectfully submitted,

ALLAN L. TUMARKIN,
Attorney for Petitioners.

Certificate of Counsel

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay and that the petition is restricted to the grounds above specified.

ALLAN L. TUMARKIN,
Attorney for Petitioners.

APPENDIX

Opinion of United States Court of Appeals

(Italics Supplied)

¶ 60,042 City of New York v. United States.

United States Court of Appeals, Second Circuit. No. 28,808. October 31, 1960. Appeal from the United States District Court, Eastern District of New York.

Federal Tax Liens v. State and City Tax Liens—Liens Not Perfected Prior to Bankruptcy Proceedings. Where federal tax liens are not perfected prior to the initiation of the bankruptcy proceedings, the government's claims are treated as ordinary tax claims under the Bankruptcy Act. The government assessed tax deficiencies against a tax payer corporation after an assignment for the benefit of creditors but before an involuntary petition in bankruptcy was filed. See Sec. 64a(4) at ¶ 6028.

Cornelius F. Roche, New York, N. Y. (Charles T. Tenney, Corporation Counsel, on brief), for appellant City of New York. Samuel Stern, Albany, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, on brief), for Industrial Commissioner of the State of New York. Douglas A. Kahn, Washington, D. C. (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, A. F. Prescott, Department of Justice, Washington 25, D. C., on brief), for appellee.

Before Swan, Chief Judge, Clark and Friendly, Circuit Judges.

Opinion in Full Text

Swan, Chief Judge. This case is before us on appeal from an order entered by the District Court for the Eastern District of New York, confirming the order of a referee

bankruptcy granting lien status under 67b of the Bankruptcy Act to certain claims of the United States for tax deficiencies. An involuntary petition in bankruptcy had been filed against the Mohawk Footwear Co. on February 26, 1958, by creditors claiming for unpaid wages and severance pay, and the company was subsequently declared a bankrupt and a trustee appointed.

(Assignment)

Within four months prior to the filing of the petition a general assignment for the benefit of creditors made by the bankrupt fourteen days earlier was perfected by filing the assignment with the New York Supreme Court of Kings County, under New York Debtor and Creditor Law. Subsequent to such assignment, on November 22, 1957, the United States assessed tax deficiencies against the company in the amount of $4,826.64, for Federal Insurance Contributions Act and withholding taxes due for the third quarter of 1957. This claim was in addition to an earlier assessment by the United States made on October 8, 1957, for $2,067.53 plus interest, due for FICA and withholding taxes for the second quarter of 1957. On the very date on which the bankruptcy petition was filed, the federal government made a third assessment in the amount of $277.39 for Federal Unemployment Tax Act obligations, and finally, on December 19, 1958, assessed an additional $84.21 as a further tax deficiency. The United States now seeks to have all but the last of these claims granted lien status under 67b of the Bankruptcy Act, 11 U. S. C. 107(b), which upholds the validity of "statutory liens for taxes and debts owing to the United States . . . created or recognized by the laws of the United States or of any state . . . even though arising or perfected while the debtor is insolvent . . . within four months prior to the filing of the petition initiating a proceeding under this title by or against him."

The United States' claim is opposed by the New York State Industrial Commissioner and the City of New York, each of which have filed tax claims in the bankruptcy proceedings.

The United States' contention that a lien had been perfected prior to the bankruptcy proceedings is based on § 6321 of the Internal Revenue Code of 1954, the relevant portion of which reads as follows:

> "§ 6321. Lien for Taxes.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Under § 6322, the lien arises at the time the assessment is made. As of that moment, therefore, if there exist property or rights to property "belonging" to the debtor, the lien will attach. In determining the nature and extent of the debtor's ownership, however, we are required to look to state law since § 6321 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." United States v. Bess, 357 U. S. 51, 55 (1958); see Aquilino v. United States, 363 U. S. 509 (1960); United States v. Durham Lumber Co., 363 U. S. 522 (1960); Fidelity & Deposit Co. v. New York City Housing Authority, 231 F. 2d 142 (2d Cir. 1956).

New York Law

Under outstanding New York decisional law, [illegible] for the benefit of creditors takes title to the

debtor's estate and holds as trustee for all the creditors. Brown v. Guthrie, 110 N. Y. 435 (1888); Brennan v. Wilson, 71 N. Y. 502 (1877). The court supervises the trustee and orders distribution of the settled estate to the creditors. N. Y. Debtor and Creditor Law, §§ 8, 15, 20, so that the estate is said to be in custodia legis. In the Matter of Crevelong & Son Corp., 259 App. Div. 351, 353, 19 N. Y. S. 2d 378, aff'd 283 N. Y. 760, 28 N. E. 2d 975 (1940); Florence Trading Corp. v. Rosenberg, 128 F. 2d 557 (2d Cir. 1942). All that the assignor owns after his assignment is completed is the right to have refunded to him whatever remains after the creditors have been satisfied. Mills v. Husson, 140 N. Y. 99 (1893).

The § 6321 lien attaches only to the extent of the taxpayer's property interest, United States v. Bess, 357 U. S. 51, 57 (1958), and is not a proper basis to levy on contingent rights before they come into being. United States v. Long Island Drug Co., 115 F. 2d 983 (2d Cir. 1940). Thus, the property, after it had been assigned by the taxpayer, could not be subjected to the government's lien. Nor is the fact that some New York decisions have upheld the validity of a mechanic's lien filed after a general assignment any support for the proposition that the federal government's lien is valid on the facts herein. A case such as John P. Kane Co. v. Kinney, 174 N. Y. 69 (1903), indicates merely that the New York courts have recognized a "preferential statutory right in the nature of an unperfected equitable lien in favor of the laborer, mechanic, materialman, or sub-contractor." Id. at 72. Whatever policy reasons impel the New York courts to impress such a security interest on the debtor's estate even before the creditor satisfies the statutory prerequisites[2] are not binding on this court or anyone

[2] This policy, apparently founded on the desire to ensure that formalities would not defeat the rights of laborers and materialmen whose claims sound in most exculpatory extends even to bankruptcy and validates a mechanic's lien filed after a bankruptcy petition. Gates & Co. v. John L. Stevens Construction Co., 220 N. Y. 48 (1917). Since a tax assessment which validates but imperfect would not give rise to a statutory lien under the Internal Revenue Code, the federal claim is invariably postponed to the [illegible]

when it is not a taxpayer but the federal government which is pressing its claim. In none of the mechanics' lien cases do the New York courts base their decision upholding the lien on an assertion that the assignor retained property rights after his general assignment had been perfected. Since it is only if such rights still belong to him that [6621] impresses a lien on the taxpayer's realty or personalty, the general assignment barred a subsequent tax lien.

The United States, however, contends that 70a(8) of the Bankruptcy Act governs, despite local property law, once a petition in bankruptcy is filed. That subsection, now 11 U. S. C. 110(a)(8), reads, in relevant portion, as follows:

> "The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court."

[Act of Bankruptcy]

The United States maintains that since the present assignment was made within four months of bankruptcy it "constituted an act of bankruptcy within" 3a(4) and

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[6] See Post & McCord v. City of New York, 86 Misc. 340, 148 N. Y. Supp. 508 (1914), aff'd, 166 App. Div. 949, 152 N. Y. Supp. 1148 (1915); Matter of Master Plumbers, Inc., 175 Misc. 956, 25 N. Y. S. 2d 190 (1941).

3b of the Bankruptcy Act, 11 U. S. C., 21a(4), so that upon filing of the petition the title residing in the assignee by virtue of the states' debtor and creditor law was extinguished by the federal bankruptcy statute and he held the property as a "naked bailee" for the bankrupt. Therefore, the federal governmental contentions, the lien attached when the deficiency was assessed against the corporate taxpayer, since the property then "belonged" to the corporation and was held in the custody of its agent.

If we could find a legitimate bankruptcy policy that is furthered by such a construction of § 70a(8), it might not be enough to say merely that the language of the statute gives no retroactive effect to this incursion on local property law; it directs that the property shall "be deemed to be held by the assignee" as an agent. However, there is no reason to suppose that Congress intended retroactively to alter the situs of title to property generally assigned for creditors. The legislative history of the present § 70a(8) indicates that it was meant to be declaratory of existing law and merely to facilitate the summary jurisdiction of the bankruptcy court under § 2a(21) to require assignees to deliver property in their possession to the trustees in bankruptcy. See H. R. Rep. No. 1409, 75th Cong., 1st Sess., 34 (1937); Shor v. McGregor, 108 F. 2d 421 (5th Cir. 1939); 1 Collier, Bankruptcy, para. 2.78; 4 id. para. 70.38. Thus, it makes good sense to have title to the assigned estate revert to the bankrupt at the time when the petition in bankruptcy is filed, though not before, in order to prevent the assignee from maintaining that he is an adverse claimant and thus entitled to plenary proceedings. May v. Henderson, 268 U. S. 111, 115 (1925).

Indeed, a contrary rule would throw into confusion the usual procedures whereby a state protects creditors once a general assignment has been made. Since § 67c of the Bankruptcy Act requires that statutory liens

possessory lien subject to be valid under 67b, the very purpose of a general assignment that of preserving the [illegible] assets and shielding them from levy by the more [illegible] creditors, see Matter of S. Feldman & Co., 247 App. Div. 420, 262 N. Y. Supp. 681 (1933), would be under [illegible] to accept the United States' contention. If the assignee acts retroactively as a mere agent, it [illegible] to remove a private creditor with a statutory [illegible] upon the estate so assigned and then file a petition in bankruptcy. Under the rule the federal government would have us adopt, 67a(5) would uphold a lien [illegible] by such a levy if bankruptcy proceedings are [illegible] within four months of the assignment. Thus, the federal lien is associated with the state's insolvency proceedings would not merely give the federal tax claim a priority which it is entitled to by reason of the Bankruptcy Act, but would also be giving to the extent of his levy, a priority which he is not allowed under state law. Curiously enough, Section 67b of the Bankruptcy Act, which was intended to [illegible] only those rights recognized under state law, [illegible] with the proposed construction of 67a(5) and 67e(2), grant more liberal priorities in bankruptcy to federal claims than would the state under its insolvency proceedings.

The government's further contention that 3466 of the Revised Statutes (31 U. S. C. 191, gives the United States' tax claim a priority would be persuasive had the bankruptcy petition not been filed. However, the Bankruptcy Act did not incorporate the priority provisions of 3466 and they do not apply in bankruptcy. Davis v. Pringle, 268 U. S. 315 (1925).

[illegible] statutes authorizing general assignments for the benefit of creditors have been approved by the Supreme Court [illegible] Section 67a of the Bankruptcy Act [illegible] Section 67a(5) of the Act [illegible] [illegible] [illegible]

[Ruling]

Reversed with instructions to treat $5,104.03 of the claim of the United States entered on April 10, 1958, and all claims filed thereafter, as ordinary tax claims under § 64a(4) of the Bankruptcy Act.